

P-495/EM-89-80DENYING PETITIONS FOR RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Darrel L. Peterson	Commissioner

In the Matter of the Filing by Metro Fiber
Systems to Provide Certain
Telecommunications Services Within
Minneapolis and St. Paul, Minnesota

ISSUE DATE: October 19, 1989

DOCKET NO. P-495/EM-89-80

ORDER DENYING PETITIONS FOR
RECONSIDERATION

PROCEDURAL HISTORY

On June 16, 1989, the Minnesota Public Utilities Commission issued its ORDER GRANTING CERTIFICATE OF AUTHORITY in this matter. That Order granted Metro Fiber Systems, Inc. (MFS) a Certificate of Authority to construct and operate a dedicated, non-switched digital fiber optic network in Minneapolis and St. Paul, Minnesota.

On June 26, 1989, the City of St. Paul (City) filed a petition asking the Commission to vacate or reconsider its June 16, 1989 Order.

On July 6, U.S. West and the Minnesota Independent Coalition (MIC) filed separate petitions for reconsideration and clarification of the Commission's June 16, 1989 Order.

Responses to the petition by the City of St. Paul were filed by the Department of Public Service (Department or DPS), the Residential Utilities Division of the Office of the Attorney General, MIC, and MFS.

No comments were received in response to the petitions for reconsideration filed by U.S. West and MIC.

The petitions came before the Commission on August 29, 1989.

FINDINGS AND CONCLUSIONS

Petition from the City of St. Paul

In its request for reconsideration the City argued that it did not receive reasonable notice of the May 24, 1988 hearing in this matter, that there was no public hearing as required by Minn. Stat. § 237.16, subd. 1, and that the Commission's granting MFS a Certificate of Authority preempts the City's authority to exercise reasonable control over the use of city streets and alleys and, thereby, adversely affects the public convenience.

Notice

The Commission finds that the City's arguments that it received inadequate notice of the Commission's May 24, 1989 meeting are without merit. The Commission believes that the following history of this filing is helpful in understanding this issue.

On August 15, 1988, MFS filed a letter of registration under Minn. Stat. § 237.64 with the Commission, indicating that it intended to construct and operate a dedicated, non-switched digital fiber optic network in the business districts of Minneapolis and St. Paul.

On March 7, 1989, the DPS filed its report of investigation and recommended that the Commission accept MFS' registration and approve its price list.

The Commission met on the matter on April 11, 1989. The Commission found that the issues raised by MFS' application were of precedential nature and that the Commission needed more information to make a final decision.

On April 14, 1989, the Commission issued its ORDER SOLICITING COMMENTS in this matter. This Order was sent to interested parties, including the City. It asked for comments on: whether the services to be provided by MFS are fully competitive, emergingly competitive or non-competitive; whether MFS needed Commission authorization to construct its fiber optic network in Minnesota, and what its impact would be on the local exchange company. The Order gave notice that the Commission would consider whether a certificate was needed and if one was granted, what its impact would be on the local exchange company. In relevant part the Order states:

Finally, the Commission is aware that widespread use of services such as those of Metro Fiber Systems may have practical consequences for local exchange systems which are not immediately apparent. For example, if high volume long distance users begin routinely bypassing local exchange carriers, there will be sharp reduction in the access fees collected by local exchange carriers. Since a portion of those fees is intended to recover non-traffic sensitive costs, such bypass raises practical and equitable issues which must be addressed. Other parties may be aware of similar issues which should be considered in the context of these filings. Order Soliciting Comments at p. 3.

Interested parties were asked to file comments by April 28, 1989, a deadline which was extended by Commission Order until May 8, 1989.

The Commission received comments from nine parties, including the City of St. Paul.

On May 12, 1989, the Commission sent a written notice of Commission meeting to all parties, including the City. In that notice, the Commission notified all parties that it would meet on May 24, 1989 at 1:30 p.m. to consider MFS' filing. Parties wishing to make oral presentation were asked to notify Commission staff by 3:00 p.m. on May 23, 1989.

On May 17, 1989, Commission staff contacted all the parties, including the City, by telephone to make sure that they all received the May 12, 1989 notice. The Minnesota Business Utilities Users Council and the DPS indicated that they had not received the May 12, 1989 notice.

On May 18, 1989, the Commission sent out a Second Notice of Commission Meeting to make sure that all parties had written notice of the May 24, 1989 meeting.

The notices of May 12 and May 18 were substantially the same, giving parties notice of the time, place and date of the hearing. The notices referenced the April 14, 1989 Order which listed the issues the Commission would consider including whether a Certificate of Authority was necessary and asked for comments on the impact of granting such a certificate.

The City's filed comments of April 20, 1989 made it clear that the City was concerned about its authority to regulate the installation of MFS facilities.

The notices of May 12 and 18 asked that parties call the Commission staff by 3:00 p.m. on May 23, 1989 if they wished to make oral argument to the Commission. The City did not respond.

Between 3:00 p.m. and 4:30 p.m. on May 23, 1989, Commission staff telephoned all the parties to confirm whether or not they intended to make oral comments at the meeting.

On May 24, 1989, the Commission met to consider MFS' filing. At the meeting, the Commission heard oral comments from all parties who expressed interest in making oral comments. Although the City was represented at the meeting, it elected not to speak.

The Commission finds that the City had adequate notice of the Commission's meeting of May 24,

1989. The City had adequate notice of the issues that would be discussed and decided at that meeting. The Commission's April 14, 1989 Order Soliciting Comments made it clear to the parties to this proceeding that whether MFS should be granted a Certificate of Authority would be decided after the Commission evaluated the impact such a Certificate would have on the communities involved, the companies offering telephone service, and the public in general. The Commission will deny the City's request for reconsideration on the grounds that the City had inadequate notice of the May 24, 1989 meeting.

Scope of Hearing

The City has also argued that this matter was decided without a public hearing. The City appears to equate a public hearing with a contested case proceeding in which sworn testimony is required and formal pleading rules are used. The Commission disagrees.

Minn. Stat. § 237. 16, subd. 1 governs this matter. It provides, in relevant part:

No lines or equipment shall be constructed or installed for the purpose of furnishing local telephone service to the inhabitants or telephone users in any locality in this state, where there is then in operation in the locality or territory affected thereby another telephone company already furnishing such service, without first securing from the commission a declaration, after a public hearing, that public convenience requires such proposed telephone lines or equipment;

The Commission is not obliged to refer all matters before it to a contested case proceeding. Here, there are no material facts in dispute that would merit a contested case proceeding. The issues raised here are questions of law and policy, the Commission concludes that the May 24, 1989 hearing was sufficient to meet the requirements of Minn. Stat. § 237.16, subd. 1.

Public Interest

The City argued that the Commission's granting of a certificate of Authority under Minn. Stat. § 237.16, subd. 1, may have eliminated the ability of the City to control the terms and conditions upon which construction may be carried on.

The Commission notes that Minn. Stat. § 237.16 does preempt a municipality from denying access to the public right-of-way if a Certificate of Authority is granted; however, that same statute also provides:

[T]he governing body of the municipality shall have the same powers of regulation which it now possesses with reference to the location of poles and wires so as to prevent any interference with the safe and convenient use of the streets and alleys by the public. Minn. Stat. § 237.16, subd. 1 (1988).

The Commission finds that the City's argument is not persuasive since it can exercise reasonable regulations with respect to the use of its streets and alleys. The Commission will deny the City's request for reconsideration on the basis that the Commission failed to consider the impact on the public of granting MFS a Certificate of Authority.

U.S. West

U.S. West argued for reconsideration on three grounds:

1. The Commission erred in failing to hold a public hearing;
2. The Commission's Order misstated U.S. West's position on the harm that would result to its ratepayers if the Certificate of Authority is granted to MFS; and
3. The Commission erred in its interpretation of Minn. Stat. § 237.60, subd. 3.

Public Hearing

U.S. West argued that the public hearing called for in Minn. Stat. § 237.16 requires more than "...soliciting comments from selected interested parties. Rather it obligates the Commission to solicit and evaluate input from the public." Petition of U.S. West at p. 2. U.S. West also argued that it received inadequate notice, less than 30 days notice of the May 24, 1989 meeting.

The Commission has discussed above, at some length, the scope and the notice given for the May 24, 1989 hearing. U.S. West received the April 14, 1989 Order and, effectively, had more than 30 days to prepare its comments on the issues raised in the May 24, 1989 meeting. Further, U.S. West has not indicated what material facts are in dispute that would require a contested case hearing nor what additional information is now available to the parties or to the Commission which would merit a contested case. At the August 29, 1989 meeting, U.S. West admitted that it had no quantifiable information on the impact of MFS' proposal beyond that offered by the Department. The Commission will deny U.S. West's request for reconsideration on the basis of the scope or the notice of the Commission's May 24, 1989 hearing in this matter.

Harm

The Commission notes that in the April 14 Order U.S. West was invited to comment on potential or actual harm that might result to itself or its ratepayers if the Commission granted MFS a Certificate of Authority. U.S. West chose not to submit written comments on this issue. U.S. West did make oral comments at the May 24, 1989 hearing that some loss of revenue would occur but also said that the potential harm is impossible to quantify. The Commission heard and considered U.S. West's remarks. In the June 16, 1989 Order, the Commission found that, in general, the parties had stated that the duplication of facilities proposed by MFS will have a de minimis effect on U.S. West.

The Commission finds that U.S. West has not identified any additional information it would offer that it did not offer orally at the hearing. The Commission heard and considered U.S. West's remarks concerning the interstate and intrastate costs and the loss of contribution from by-passing customers at the May 24, 1989 hearing. The Commission will not reconsider its June 16, 1989 Order on the basis that the Commission misstated U.S. West's position.

Interpretation of Minn. Stat. 237.60, subd. 3

Both U.S. West and the Minnesota Independent Coalition (MIC) asked the Commission to reconsider its interpretation of Minn. Stat. § 237.60, subd.3 as given in the June 16, 1989 Order.

The Commission will deny these requests. The June 16, 1989 Order was issued prior to the effective date of recent revisions to Minn. Stat. Chap. 237. Those revisions, effective July 1, 1989, make Minn. Stat. § 237.60, subd. 3 applicable to all telephone companies. Prior to July 1, 1989, Minn. Stat. § 237.60, subd. 3 applied only to those telephone companies which had elected to be subject to competitive service regulation. In its June 16, 1989 Order the Commission found that two of the services that MFS was offering were special access services which were not classified or yet found to be emergingly competitive. Since these services were not competitive, it is clear that on June 16, 1989, Minn. Stat. § 237.60, subd. 3 did not apply. After July 1, 1989, the Legislature changed the statute's applicability and after that date, the Commission will apply the amended statute to all telephone companies. The Commission finds that the interpretation of Minn. Stat. § 237.60, subd. 3 as it would exist on July 1, 1989 was not before the Commission at the May 24, 1989 hearing nor addressed in the Commission's Order of June 16, 1989. The Commission will deny the requests to

reconsider the June 16, 1989 Order to modify the Commission's interpretation of Minn. Stat. § 237.60, subd. 3 to address the changed application of that law after July 1, 1989. It is not necessary to the decision here and would serve no useful purpose.

The Commission will deny the petitions filed by the City, MIC, and U.S. West to vacate or reconsider its June 16, 1989 Order in this case.

ORDER

1. The Commission hereby denies the requests filed by the City of St. Paul, the Minnesota Independent Coalition, and U.S. West for reconsideration of its June 16, 1989 Order in this case.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen
Executive Secretary

(S E A L)